The Trial and Death of Jesus

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A Jewish perspective. Prof. Waller is the Sir Leo Cussen Chair of Law, Monash University.

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By Louis Waller

I speak to you from a Jewish perspective. I have been aware of the death of Jesus since I was a little boy. My interest in the trial of Jesus was engendered by two particular episodes. One was the visit to the Monash Law School in 1969 of Justice Haim Cohn who went on to become the President of the Supreme Court of Israel. He gave a staff seminar on this subject; he had published an article on the theme in the Israel Law Review, and subsequently there appeared his book, entitled in English *The Trial and Death of Jesus* (1971). I shall rely substantially on what Justice Cohn has written and, so to speak, rest on the

shoulders of his extensive scholarship in Jewish and Roman law, in history and in rabbinics, which is all made clearly and effectively manifest in his book.

The second spur to my interest was smaller but nonetheless pointed. Nearly 40 years ago, our greatest judge, the late Sir Owen Dixon, Chief Justice of Australia, delivered the Syme Oration to the Royal Australasian College of Surgeons. The theme of his oration was the search for truth as a basis for action, which he illustrated vividly by a number of examples drawn not only from his judicial experience, but also from his experiences as the Australian Minister to the United States in the most awesome years of World War II. At the end of this oration, this is what he said: “If truth is an attribute which can be ascribed to a purely legal conclusion, it should be within our reach... But it is,” said Dixon, “to Bacon’s *Essay on Truth*, that I have turned for the title of

this paper. ‘What is truth?’, said jesting Pilate, and would not stay for an answer.”’ This is Dixon’s last sentence: “I have not forgotten that when Pilate said this he was about to leave the judgement hall.” The adjective that Lord Bacon employed, and which Dixon so powerfully emphasised by choosing “Jesting Pilate” to entitle his oration, struck a vibrant chord in my mind, which has continued to play.

Let me set the scene.

The Hasmonean royal dynasty, initiated by the heroic Judah Maccabeus - the Hammer who defeated the forces of Antiochus Epiphanes of Syria and re-sanctified the Second Temple - petered out in pathetic internecine conflicts. In 63 BCE, the Roman general Pompey, ensconced in Syria, was invited to enter Judea and “protect” it. The Idumean convert Herod persuaded the rulers of Rome, Marc Antony and Octavian, to appoint him King of Judea, under the suzerainty of Rome. After his

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death in 4 BCE, his son Archelaus was made Ethnarch -not King - of Judea and Samaria, while his other sons Antipas and Philip were appointed Tetrarchs of Galilee and the North Eastern Province respectively. It was Antipas who, to please Salome, had John the Baptist murdered and his head presented on a platter to her.

In 6 CE, Augustus Caesar deposed the hopelessly ineffectual Archelaus to become the absolute ruler of Judea, appointing a Procurator, subordinate to the Legate in Syria, to exercise his authority. In 33 CE, that Procurator was Pontius Pilate. The capital of Judea was moved to Caesarea, and ample Roman garrisons were stationed throughout the province it now was. “Judea had the name”, wrote the well-known Jewish historian Dr Cecil Roth, “of being the most inflammatory and difficult of all Roman provinces.”

Its citizens were divided into what today we might call factions, though

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they are often referred to as sects. The differences between them were of the most profound kind. The largest faction was the *Perushim*, or Pharisees, who were to survive as the forebears of the Jews of today, enunciating their belief and acceptance of the *Torah shebichtav,* the Torah which Moses received and wrote down, and also the *Torah shebe 'al peh,* the Oral Torah, which he received on Sinai and transmitted to Joshuah, who in turn transmitted it to the judges of Israel, so that it reached the great Rabbis of the Jewish people who finally gave it written form as the Mishnah and the Gemara, together making up the Talmud. The Pharisees exhibited what today we would describe as a high sense of social justice. The crowds who greeted Jesus when he came to Jerusalem were nearly all Pharisees, or sympathetic to that *Weltanschauung.*

The *Tzadukim,* or Sadducees, were the opponents of the Pharisees. They were mainly people

of wealth and high social status, and included many of the priests who performed the services of the Temple, whose chief was the High Priest or *Kohen gadol.* “They came close”, writes Rabbi Joseph Telushkin in *Jewish Literacy, (1991)* “to being Biblical literalists”. They disappeared after the Temple was destroyed by the Romans in 70 CE.

The *Ishi’im* or Essenes, were a small ascetic band, most of whom moved to the desert near the Dead Sea. Some of the now famous scrolls discovered in 1947 in Qumran were written by them.

This then was Judea, in which Jesus of Nazareth lived and died. The accounts of his life and his trial and his execution by hanging on the cross - his Crucifixion -in the four Gospels, are not the evidence of eye and ear witnesses. They were written, it is now universally agreed, at least forty and as much as eighty years after that cataclysmic

event, and they differ from each other in many critical particulars. They were, like all books of high moment, written from a specific perspective and with a particular aim or object.

That Jesus was tried before Pontius Pilate, in his court, on a charge of claiming to be *Rex Judeorum,* that is the King of the Jews, a charge of high treason, convicted, sentenced to death, and hanged on the cross is independently reported by the Roman historian Tacitus, and by the famous Jewish historian Flavius Josephus in *Antiquites of the Jews* - though the authenticity of his account is strenuously disputed and strongly asserted to be a later interpolation. It is as follows:

Now there was about this time, Jesus, a wise man, if it be lawful to call him a man, for he was a doer of wonderful works - a teacher of such men as receive the truth with pleasure. He drew over to him

many of the Jews, and many of the Gentiles. He was [the] Christ; and when Pilate, at the suggestion of the principal men amongst us, had him condemned to the Cross (3 Apr 33 AD), those that loved him at the first did not forsake him, for he appeared to them alive again the third day (5 Apr 33), as the divine prophets had foretold these and 10,000 other wonderful things concerning him; and the tribe of Christians, so named from him, are not extinct at this day.

All this is straightforward, and indeed in line with what is known of the ways in which the hegemony of Rome was preserved. The words “King of the Jews” were written on the board nailed to the cross above Jesus’s head, we are told, as prescribed by Roman law - *Titulus qui causam poenae indicat,* as Suetonius has it. Jesus was convicted on his own reply to the question addressed to him by Pilate: “’Art thou the King of the Jews?’ And he answered him

and said, ‘Thou sayest it.”’ The insurrection or treason inherent in that claim to be the king, not appointed by the Emperor of Rome, was a heinous crime under the *Lex lulia Maiestatis*, which Augustus enacted in 8 BCE. It carried the punishment of death. It was within the jurisdiction of the procurators in the provinces, who were invested with the *ius gladii*, or power to pass sentence of death. The procurator could transfer the case to Rome if the accused was a Roman. He had no power to pardon - that was the Emperor’s alone.

Pontius Pilate may, writes justice Haim Cohn, have acted unlawfully. In 36 CE, indeed, he was recalled in disgrace, for abuse of power. But it was, according to Philo in his *Legatio ad Galum*, his cruel, despotic and tyrannical excesses which finally led to his downfall, in that he committed “countless atrocities and numerous executions without any previous trial.” This hardly tallies with the Gospel accounts of a

reluctant governor well-disposed to Jesus, and anxious to acquit and to release him. It is at odds with Bacon's judgment caught in the single, unforgettable adjective - "jesting".

What happened on the night before that trial in Pilate's hall of judgment? Was there a trial of Jesus before the Sanhedrin, the Jewish Court of 23 or even 71, which heard and determined a charge of blasphemy leveled against him under the law of Moses, the Torah law, and did it result in the judgment of guilty and the transfer of Jesus to the Romans, the so-called "civil power", for execution? Haim Cohn's view is that on the night before his trial Jesus was indeed in the house of the High Priest. But there was no trial.

Cohn gives six congent reasons for his conclusion. The first was that the Sanhedrin could not, and never did, exercise jurisdiction in the house of the High Priest or anywhere outside the Courthouse and the Temple precinct.

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Secondly, criminal trials had to be conducted and finished during the daytime; no session of the criminal court was permissible at night. Thirdly, a criminal trial was not allowed to take place on the eve of a feast day, nor on the feast day itself, and the setting is Pesach or Passover. Fourthly, no man might be found guilty on his own confession. Fifthly, a conviction must proceed from the testimony of at least two truthful and independent witnesses, who give evidence both as to the commission of the offence in their very presence and as to the knowledge of the accused that the act was punishable by a particular penalty. And sixthly, the offence of blasphemy is not committed unless the witnesses testify that the accused had, in their presence, pronounced the ineffable name of God, the *tetragrammaton* which might only be pronounced once a year on the Day of Atonement by the High Priest in the innermost sanctuary of the Temple in Jerusalem, the

Kodesh Kodashim. “*The* apparent violation”, justice Cohn goes on, “of all rules of procedure and all provisions of the substantive criminal law, furnishes the propounders of the Jewish trial theory with the well-nigh conclusive argument that both the trial and the sentence were illegal. But so far from disproving their theory, this illegality only adds infamy and opprobrium to the perversion and miscarriage of justice which characterized the trial. On the other hand, however, it has been maintained that such wholesale violation of all the rules of law and procedure is not only highly improbable, but in view of the rigorous and formalistic exactitude for which the Pharisees were of course notorious, rather inconceivable.”

What was there then in that place on that fateful night before the feast of Pesach, the Passover? Haim Cohn suggests that there was a desperate attempt by the Sanhedrin, led by the High

Priest, to avert, or at least mitigate, the apprehended fate of Jesus, whose entry into the City of Jerusalem had been greeted by a multitude of cheering supporters. The only way in which the Sanhedrin could still prevent the execution of Jesus and it is clear that they knew he was to be brought before Pilate on the following day was to bring about his acquittal or at least a suspension of his sentence if he bound himself to be of good behaviour. To secure an acquittal, Jesus had to be persuaded not to plead guilty, and witnesses had to be found to prove his innocence. To secure at least a suspension of his sentence, Jesus had to be persuaded to promise that he would not, in future, engage in any treasonable activities. That is Cohn's explanation for the specific events, including the summoning of many would-be witnesses, at what was, in his view, this extraordinary effort to prevent what took place the next day.

The witnesses who

were called, the ‘false witnesses’, produced no rebuttal or refutation from Jesus, who held his peace, as the Gospels say, though he was not only expected, but apparently also entitled, to cross-examine and discredit them. But as they were in fact speaking the truth, there was really no point in his intervention. It was only when the High Priest himself started to ask him questions, that, according to the Gospels, Jesus reacted. On being asked whether he was Christ, the Son of the Blessed, he replied not only that he was, but also added “and you shall see the son of man sitting on the right hand of power and coming in the clouds of heaven.” We don’t know whether this was the only question that was addressed to him by the High Priest, or whether the High Priest had also asked him before about his teachings and opinions in general, which is the conclusion that can be derived from the Gospel of St. John. Be that as it may, says Cohn, it is clear that it was

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Jesus's answer to that last question which caused the High Priest and the Sanhedrin to give up in despair. "The nature of the question", says Cohn, "is not such as to be characterized as blasphemy. And the report," he concludes, "that the Sanhedrin sentenced Jesus to death upon hearing his blasphemy is thus certainly unhistorical. Since there was no blasphemy and since there was no trial, there was no sentence." Why then, as the Gospels report, did the High Priest rend his garments, the traditional sign of mourning to this very day among Jews? If the High Priest rent his clothes that night, Cohn writes, it was because of his failure to make Jesus see this point and co-operate, and because of the impending doom. The assertion by Jesus that he was the true Messiah, while not constituting a criminal offence, amounted to a rejection of the offer extended by the High Priest and those supporting him, to avoid the

events of the following day. They could have persisted in their efforts with Jesus only if they accepted his assertion and recognized his claims. They did not. Not only did Jesus decline to abstain in the future from those activities which might bring him again into conflict with the Roman authorities, for the reasons already mentioned; but he also reasserted his Messianic mission and insisted on its continuation and its culmination. It was thus not blasphemy, because there was none, which made the High Priest rend his clothes. It was his utter failure to bring Jesus to reason, and so save him from his fate. Perhaps there was also some real foreboding of the disastrous consequences which were to follow.

The Jews had no part in the trial before Pilate. The Jews had no part in the crucifixion of Christ. It was the soldiers under Pilate’s command who, as the Gospel writers themselves state, scourged him,

led him to the place of execution and nailed him to the cross. Indeed, as the Gospel of Luke has it, “And there followed him a great company of people and of women, which also bewailed and lamented him. But Jesus turning unto them said, ‘Daughters of Jerusalem, weep not for me, but weep for yourselves and for your children.’” And the Gospel continues, “and the soldiers also mocked him, coming to him and offering him vinegar. And saying ‘If thou be the king of the Jews, save thyself.’”

What then is the explanation for what followed? What is the explanation for what appears in the Gospels, particularly in the Gospel according to St. Matthew, and the explanation for the unbroken history of the last 2000 years? Before I come to that explanation, there is more to be said about the High Priest and his supporters. They were no friends of Jesus. They were all to a man, Sadducees. But they realized that their own position and standing was

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rapidly eroding under the sustained criticism of the mass of the community who were either Pharisees or, as I said earlier, sympathetic to and closely identifying themselves with that approach to Jewish law and life. The High Priest and his party saw themselves as shoring up their own situation if they could achieve, and be seen to achieve, the rescue of one acclaimed as a hero amongst the people. Remember the nature of Jesus's entry into Jerusalem.

The explanation why the Gospel writers, and those who followed them, portrayed these events, which I have just described, in a manner which led to the conclusion that the Jews of that time, and beyond that, the Jews of all time, bore a responsibility for the death of Jesus, is best, and briefly, summed up by the observations that Haim Cohn makes in the opening pages of his book. He writes:

It is submitted and on good authority that they, that is the Gospel writers, had

in mind not only this theological purpose, that is the purpose of conveying to their readers the personality and status of Jesus Christ, but also an apologetic one. The earliest Gospel of Mark was written between 70AD and 72, some 40 years after the trial and crucifixion. The Gospel of Luke was next, written about 85. The Gospel of Matthew is commonly dated about 90, and that of John, about 110. Over the span of the second half of the first, and the beginning of the second century, the Christians were a small community, struggling desperately for some measure of tolerance from their Roman overlords, who regarded Christian refusal to worship the deified Emperor, Christian insistence on worshipping God and his Messiah, the Christ, as a capital offence. It was bad enough, according to the Romans, to deny the Imperial divinity and pray to an invisible God as the Jews did. But it was unforgivable on top of that to worship a malefactor crucified by the government

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of Rome, and declared to have an authority exceeding that of the Emperor of Rome. infuriated by the inflexible obstinacy of the Christians by the adherence to a depraved superstition," (and these are quotations from a Roman writer), "the Romans persecuted them cruelly."

It was in the interes of this harshly persecuted but determined group to change the perceptions of the Roman authorities. By contrast, to claim, and worse to emphasise, that it was Imperial Rome whose officers had tried, convicted and executed Jesus was to underscore the relationship of persecutor and persecuted, "likely to heap fuel on the flames of oppression. Rather, if the Procurator who was in Jerusalem was portrayed as a man convinced of the worth and value of the teachings and the acts of Jesus, it might then be argued from that premise that those who followed his path should be left in peace. Cohn concludes that this was the motive

which determined the course all the Evangelists took in describing the events of those several days. They placed the burden of guilt on the heads of the Jews, “who were anyway an object of intense and equal hatred to the Romans and to the Christians.”

Recently I read an article with the title “Genocide and a Nation’s Guilt”, written by Robert Manne in *The Australian* of 13 May 1996. In his opening paragraph, he wrote: “in Washington last week, the German Foreign Minister, Klaus Kinkel, delivered an important speech to the American Jewish Committee. He told this audience that Germans remained willing to accept full responsibility for the Holocaust.” It is the next sentence which is particularly significant. “But he reminded it that guilt was never collective or hereditary. No one doubted that this speech represented a kind of oblique official response to a book, *Hitler’s Willing Executioners* by Daniel Goldenhagen. I was

reminded by it that when I was an impressionable teenager, there came into our house a book called *Black Boy,* written by Richard Wright, whom I subsequently discovered was regarded as one of the first, if not the first, of the great African-American contributors to the development of the modern literature of the United States. When I read this book, it made the most searing impressions on my mind. In his book Wright writes this: “All of us black people who lived in the neighbourhood hated Jews, not because they exploited us, but because we had been taught at home and in Sunday School that Jews were ‘Christ-killers’. With the Jews thus singled out for us, we made them fair game for ridicule.” Wright then quotes a number of ugly doggerel ditties that he and his friends would sing as they danced around the Jewish shopkeeper and his children who lived in their area. Then he writes: “No-one ever thought of questioning our right

to do this. Our mothers and parents generally approved, either actively or passively. To hold an attitude of antagonism or distrust towards Jews was bred in us from childhood. It was not merely racial prejudice, it was a part of our cultural heritage". And now I speak as a witness, and I want to avoid any exaggeration. But in my own boyhood, in this city, in one of its southern suburbs, I heard not once, but several times, from my own nine and ten year old contemporaries, that the Jews, all the Jews everywhere and always, had killed Christ.

This has been a Jewish perspective it is not a comprehensive one. But then, as the centurion in the Gospel said: "I am a man under authority", and I obey the instructions I was given about the range, and the time, that was allowed to me for this presentation.

Prof. Louis Waller, AO, is the Sir Leo Cussen Chair of Law, Monash University. The article is

based on a presentation he gave to the Victorian Council of Christians and Jews on 16 May 1996. Source: Gesher. Used with permission.

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